LIBRARY
SUPREME COURT, U. S.

FILED
JAN 4 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 75

FRANK LEE, as Commissioner of Corrections of Alabama, JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX MCLAUGHLIN and WILLIAM MITCH, as Members of the Board of Corrections of Alabama; and Robert K. Austin, as Warden of the City Jail of Birmingham, Alabama,

Appellants,

v.

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as mother and next friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as mother and next friend of Cecil McCargo, Jr., a minor, CECIL MCCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION, SITTING AS A THREE-JUDGE DISTRICT COURT

APPELLEES' MOTION TO FILE REPLY BRIEF AND REPLY BRIEF TO THE SUPPLEMENTAL BRIEF OF APPELLANTS AFTER ARGUMENT

CHARLES MORGAN, JR.
5 Forsyth Street, N.W.
Atlanta, Georgia 30303

ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue North
Birmingham, Alabama

LAUGHLIN MCDONALD
5 Forsyth Street, N.W.
Atlanta, Georgia 30303

MELVIN L. WULF
156 Fifth Avenue
New York, New York 10010

Attorneys for Appellees

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 75

FRANK LEE, as Commissioner of Corrections of Alabama, ET AL., *Appellants*

v.

CALIPH WASHINGTON, ET AL., etc., *Appellees*

APPELLEES' MOTION TO FILE REPLY BRIEF TO THE SUPPLEMENTAL BRIEF OF APPELLANTS AFTER ARGUMENT

Appellees hereby move the Court to permit the filing of a reply brief to the Supplemental Brief of Appellants After Argument heretofore filed herein by special leave of this Court granted on December 4, 1967.

Respectfully submitted,

CHARLES MORGAN, JR.
5 Forsyth Street, N.W.
Atlanta, Georgia 30303

ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue North
Birmingham, Alabama

LAUGHLIN MCDONALD
5 Forsyth Street, N.W.
Atlanta, Georgia 30303

MELVIN L. WULF
156 Fifth Avenue
New York, New York 10010

REPLY BRIEF TO SUPPLEMENTAL BRIEF OF APPELLANTS AFTER ARGUMENT

Response to Appellants' Point I

Appellees' counsel did contend in oral argument that under Alabama's present state administration prison officials could not be expected to abolish racial distinctions in penal facilities. This contention was based upon no misunderstanding of law. It was based, instead, upon a rather clear understanding of fact.[1]

Indeed, the Board of Trustees of the University of Alabama is "self perpetuating" and is generally considered the least subject of all the agencies of Alabama's government to outside political interference. The Governor himself serves only as an ex-officio member and then only for the term of his office. That mattered little in 1963 when then Governor George C. Wallace stood in an appropriately designated spot "in the school house door." That stand, albeit a brief one, symbolized the then well known now universally conceded attitude of Alabama's administration and the reluctance or inability of presumably independent state agencies to stand in opposition to it.

That, Mr. Wallace and wife, have achieved political pre-eminence in Alabama is not subject to proof in this Court. And a "stand-in-the-jail house door" well may not occur. But that the striking down of statutory racial bars in Alabama would result in voluntary state

[1] Two members of the five member Board of Corrections (appellants Button and Cashion) are serving under appointments made by previous Gorevrnors. Two other members (appellants McLaughlin and Mitch) were appointed or reappointed by Governor George C. Wallace. The fifth appellant, Mr. Luttrell's, term has expired and he is serving until his successor shall have been appointed by Governor Lurleen B. Wallace.

action taxes credulity. The voluntary striking down of racial bars in Alabama's penal and detentional institutions simply has not and cannot occur.

All too often in the recent past federal compulsion through court-orders, withdrawals of federal economic assistance, the enactment of statutes, the appointment of voter registrars and federal prosecutions for crimes of racial violence has proven necessary to obtain simple compliance with the clear mandates of the Constitution. And, on more than one occasion the use of troops has proven necessary to enforce the mandates of United States courts.

Thus Alabama's recent if not total history clearly demonstrates that there a court order is not merely a legal means to a constitutional end; almost as importantly it sometimes serves as a mantle necessarily worn by state officials conscientiously attempting to comply with the requirements of law in a racially changing society.

Response to Appellants' Point II

The Appellants in this case are responsible for the present, past and future assignment of prisoners to penal and correctional institutions.

Response to Appellants' Point III

Alfred Earl Toles v. *Hon. Nicholas Katzenbach, etc, et al.* 36 L. W. 2235, —— F. 2d —— (No. 21,268 9th Cir. Sept. 27, 1967) clearly establishes a sort of "Proposition 14" for United States prisoners. *Cf. Reitman* v. *Mulkey,* 387 U.S. 369 (1967). *Toles* seems clearly erroneous. But, based on *Toles* it may be assumed that recalcitrant prison officials allowing old prejudices to govern correctional institutions might fashion

a myriad of method labelled "discretion" in order to preserve the racial integrity of separate, if unequal, prison facilities and opportunities. Cf. The use of discretion by state voting officials at the heart of *United States* v. *Mississippi*, 380 U.S. 128 (1965) and *Louisiana* v. *United States*, 380 U.S. 145 (1965).

Response to Appellants' Point IV

The District Court found the warden of the Birmingham City Jail a proper class representative. (See also R. 171-172)

Response to Appellants' Point V

Race simply cannot in and of itself ever be a valid standard for classification of prisoners. The example cited in oral argument was the recent confinement of Dr. Martin Luther King, Jr., in the Bessemer and Birmingham Divisions of the Jefferson County Jail *Walker* v. *Birmingham*, 388 U.S. 307 (1967). The security of any prisoner is a paramount consideration of prison administration. The King case presents an excellent example. For it is not merely white prisoners from whom he and his associates must of necessity have been separated. For to have confined Dr. King and his associates with *certain* Negro prisoners could have created security problems. The same may be said of a convicted member of a racist group. The Klansman in a penitentiary may find himself cast in with *certain* members of political, religious or ethnic groups who might be more dangerously antagonistic to him than some Negroes. Indeed, in prison work situations it would be rare if southern racists and southern Negroes were found unable to work together, side-by-side, in at least as amicable a manner as they may have

at an unlawful still located in a wooded area in an Alabama county. In short, the question should not be related to the race of the prisoner but, instead, to the prisoners themselves.

Response to Appellants' Point VI

That "Federal Judges rush in where" recalcitrant state officials, will not "tread" is not the fault of the Courts. But, in Alabama it has proved the salvation of the Constitution.

The newspaper editorials speak for themselves. And, although that editorial entitled "Brotherhood Behind Bars Failed Horribly" (Appellants' Supplemental Brief, p. 14) appears inaccurate according to other published reports, it is admitted that upon occasion the Montgomery *Advertiser* has been critical of the Wallace administration. Indeed, the viewpoint expressed in the editorials reprinted by Appellants do seem to express a more moderate view than Alabama's present administration.

Respectfully submitted,

s/ CHARLES MORGAN JR.
Charles Morgan, Jr.
5 Forsyth Street, N.W.
Atlanta, Georgia 30303

ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue North
Birmingham, Alabama

LAUGHLIN MCDONALD
5 Forsyth Street, N.W.
Atlanta, Georgia 30303

MELVIN L. WULF
156 Fifth Avenue
New York, New York 10010